United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1623

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RAFAEL NAVEDO,

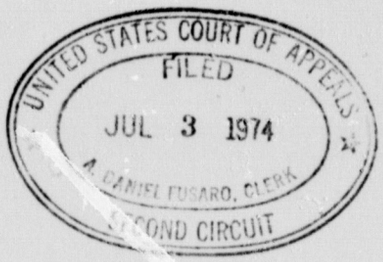
Appellant.

Docket No. 74-1623

BP/S

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court's rejection of appellant's offer to plead guilty to conspiracy to sell cocaine (count one) constituted an abuse of discretion.

2. Whether the evidence in support of count three is insufficient to support the verdict, or whether the District Court's failure to charge knowledge as an essential element of the count constitutes plain error.

3. Whether the introduction of appellant's post-arrest inculpatory statement, obtained in violation of Miranda v. Arizona, constitutes plain error.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles L. Brieant, Jr.) rendered April 30, 1974, after a jury trial, convicting appellant of conspiracy to distribute cocaine (count one), possession of a firearm during the commission of a federal felony (count two), and interfering with a federal officer (count three). Appellant was sentenced to a concurrent term of imprisonment of three years on count one, five years on count two, and four years on count three. He is currently serving his sentence.

Leave to appeal in forma pauperis was granted, and this Court continued the assignment of The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Count one of the indictment* charges appellant, co-defendant Migdalia Reyes, and "others to the Grand Jury unknown" with conspiracy to distribute cocaine, in violation

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*The indictment is annexed as "B" to appellant's separate appendix.

of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A). Appellant is the sole defendant named in counts two and three, which respectively charge possession of a firearm during the commission of a federal felony, in violation of 21 U.S.C. §246, and assault of a federal officer, in violation of 18 U.S.C. §111.

A. The Court's Rejection of Appellant's Offer to Plead Guilty

On December 11, 1973, appellant appeared with counsel* before Judge Brieant and, with the consent of the Government, offered to plead guilty to count one** (conspiracy to distribute cocaine) in full satisfaction of the indictment (Transcript of December 11, 1973, at 2-3).

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*In connection with his offer to plead guilty, appellant was represented by Barry Asness, Esq. Mr. Asness was assigned pursuant to the Criminal Justice Act. However, upon Judge Brieant's rejection of the guilty plea on January 25, 1974, Mr. Asness was relieved because he was becoming a prosecutor, and The Legal Aid Society, Federal Defender Services Unit, was assigned. At trial appellant was represented by Mrs. Michele Hermann of The Legal Aid Society.

**Count one of the indictment alleges a continuing conspiracy to distribute cocaine from April 2, 1973, to the date of filing (October 15, 1973) between appellant, the co-defendant Migdalia Reyes, and "others to the Grand Jury unknown." The overt acts alleged relate to incidents occurring on April 5, 17, and 18, 1973.

The Assistant United States Attorney prosecuting the case advised the court of his ability to prove a prima facie case under count one, and further noted that although the white powder which appellant and "Roy" (an unindicted co-conspirator) sold to the undercover agents on April 5 consisted of procaine, a non-narcotic substance, appellant's pre-arraignment statement acknowledged his participation in a sale of "cocaine" on that date, thereby reflecting appellant's unawareness of the true nature of the substance and his mistaken belief that the package contained cocaine* (Transcript of December 11, 1973, at 8-9).

Thereafter, the court extensively questioned appellant pursuant to Rule 11 of the Federal Rules of Criminal Procedure concerning the voluntariness of his plea** and its

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*Defense counsel indicated that he and his client were aware of these facts and had spent "many hours" discussing this matter (Transcript of December 11, 1973, at 9).

**Appellant acknowledged that he had extensively reviewed the indictment with his attorney, that he understood the charge, and that he wanted to plead guilty. Appellant additionally stated, in response to the Court's questions, that he was aware of his right to a speedy trial, to a trial by jury or by the Court, and his right to be confronted by his accusers and cross-examine them, and to call witnesses in his own behalf. He further asserted that he was aware he was presumed innocent and that the Government had the obligation of establishing his guilt beyond a reasonable doubt, and that, by pleading guilty, he waived all these rights. The Court further advised appellant of the maximum sentence which could be imposed and elicited from appellant that no promises by the Government or by his attorney or by the Court had induced him to plead guilty (Transcript of December 11, 1973, at 3-10).

factual basis. Appellant readily admitted that he accompanied "Roy" in the delivery of a package of what he believed to be a quantity of cocaine on April 5, 1973, at 1581 Fulton Avenue in the Bronx. Appellant further stated that "Roy" had told him the package contained cocaine and that "Roy" had paid him the sum of $50 for assisting in the delivery of the package.

Appellant stated that he accompanied "Roy" for the same purpose on April 17, 1973, when they were attempting to deliver a second package to the same address as the first transaction. With regard to both transactions, appellant stated that he was assisting in the delivery of cocaine, which he knew was wrong.

The Court reserved decision on the plea offer and requested the Government to submit a memorandum (with a copy of appellant's post-arrest statement* annexed thereto) relative to the question of whether another person had conspired

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*The Judge explained that he would consider the post-arrest statement "as an exhibit solely for the purpose of permitting me to ascertain whether the plea is knowing and voluntary, and whether it ought to be accepted in the interests of justice, and based on that, I will decide whether to accept this plea."

with appellant to distribute cocaine* (Transcript of December 11, 1973, at 10-13).

In its memorandum of law** in support of acceptance of the plea, the Government argued that since appellant admitted his participation with "Roy" in a conspiracy to sell drugs, and since appellant admitted he was unaware that the package contained procaine, there was sufficient factual basis for acceptance of the plea, and the Court should not "speculate as to the state of mind of other co-conspirators." The Government additionally urged acceptance of the plea on the grounds that it was evident from the negotiations and attempted delivery of cocaine relative to a second transaction on April 17, which appellant also readily admitted, that the defendant and "Roy" had knowingly conspired to sell cocaine even though the latter sale was never consummated.***

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*In the event the plea was rejected, the Court stated: "I will be inclined to dismiss count one of the indictment" (Transcript of December 11, 1973, at 13-14).

**Annexed as "D" to appellant's separate appendix.

***In the post-arrest interview sheet prepared by Assistant United States Attorney Pyckett (see Appendix "D"), appellant admitted arranging for the sale and delivery of cocaine relative to the April 5 and 17 transactions along with another "guy." In discussing the April 5 transaction, appellant at no time stated that the package contained procaine, but instead asserted that the transaction involved "cocaine." The record does not reflect whether this post-arrest statement was annexed to the Government's memorandum of law as the Court requested. However, this is immaterial, since appellant's admissions in support of acceptance of the plea were more extensive than the admissions made in the statement. Additionally, the Assistant United States Attorney explained to the Court that appellant had referred to the April 5 trans-

The Court rejected appellant's plea offer on January 25, 1974:

> I will state now so there will be no question about the information which the defendant gave me when I examined him before when he offered to withdraw his plea of not guilty to count one. The factual data which he told me, which I must accept as true for the purpose of whether or not I will consider his plea of guilty, were not sufficient to establish an element of the count one, which I find to be lacking, and that is that there was present in the situation at least one coconspirator who had the specific intent to engage in a conspiracy to deal in narcotic drugs, and based on the information he gave me when I examined him,[*] that did not exist.
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> Transcript of January 25, 1974, at 3. Emphasis added.

Thereafter, the Court added:

> Of course, it is possible that on a trial the Government might prove the existence of such an element and, of course, if they did, after an entire plenary trial, after the Government had completed its case, I think I would be required to dismiss count one.
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> Id., at 3-4.

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*Immediately prior to trial, the Court amplified on this by stating:

> Now, at the time of the colloquy ... under Rule 11, the defendant steadfastly refused to discuss or concede in any way that Miss Reyes was involved in any wrongdoing with him, and in the absence of an admission on his part to that effect I felt constrained that I could not accept his plea of guilty to the first count because an essential element was lacking.
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> Transcript of March 18, 19, 1974, at 9. Emphasis added.

Following the two-day trial, the jury convicted appellant on all counts of the indictment.* Appellant was sentenced to concurrent terms of three years' imprisonment on count one, five years' imprisonment on count two, and four years' imprisonment on count three. Thus, appellant is compelled to serve two additional years' imprisonment by virtue of the District Court's refusal to accept the plea of guilty to count one.

In colloquy with defense counsel relative to the sufficiency of the evidence on count one after the return of the jury's verdict, the Judge set forth his reasons for rejecting appellant's offer to plead guilty:

> ... [M]y understanding of my discussion of the entire case, ... we were always talking about a sale of non-contraband procaine, sugar, or what you will, we were always talking about the sale of an innocent powder, and it was never made clear to me in the colloquy we had, or in the statement I took when I took the plea, that the powder incident occurred on the 5th of

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action as involving cocaine, thus reflecting his unawareness of the procaine.

*The Court instructed the jurors that, in order to convict for conspiracy, they must find that two persons agreed to sell narcotic drugs. The Court further charged that the only possible co-conspirators were the defendant, the co-defendant, and "Roy." As the Court acknowledged (285), by acquitting the co-defendant and convicting appellant, the jury found that appellant and "Roy" had conspired to sell cocaine as appellant and the Government had contended in support of the plea.

April and that the other activities occurred on the later date. I was given to understand, and I admit the man has a language problem, that he got paid money for delivering powder which Roy presumably knew was innocent, and that she had nothing to do with it, which of course the jury verdict bears out, but he had steadfastly maintained to me that Miss Reyes was totally innocent of any involvement, that he got paid money for delivering procaine on April 5, and that Roy knew, or was presumed to know, that it was procaine, and I must tell you that I never knew until the trial unfolded that there were two separate dates and that these discussions and this brown paper bag and all this other evidence that we have been exposed to in the last two days was present in this case at all.

In this regard I don't fault [the Assistant United States Attorney] because it was not up to him to supply data which Mr. Navedo did not formally admit in open court. For [the Assistant United States Attorney] to have prompted [appellant] to have said to me, well, he is talking about April 5, but on April 17 and 18 he did thus and so, would have been improper and I wouldn't have permitted it. I won't take a guilty plea unless the man himself gives me all the elements, and he didn't do so.

It may be due to a language barrier, or it may be

be due to only jumping at conclusions, but I know that the man told me that he delivered stuff for Roy which turned out to be non-contraband, that he got paid a sum of money for doing it, and that she had nothing to do with the case, and it couldn't be a conspiracy with Roy under those facts because Roy knew it was non-contraband, and there couldn't be a conspiracy with her because according to him she was totally innocent of any involvement, so I couldn't take his plea.

[DEFENSE COUNSEL]: I don't understand what the evidence at trial could show to change your Honor's prior conclusion about Roy's state of mind.

THE COURT: Because on the 17th and 18th the facts are such that the jury could have inferred, particularly based on his admission to Pyckett, which was never mentioned to me at any time in this case, until today, that he in truth did agree with Roy to deliver true cocaine on the 17th, and that he sent somebody for cocaine and that there was a brown paper bag which the jury could have inferred had cocaine in it, and that he committed the overt act of going there in the truck to complete the deal.

I tendered the entire issue to the jury so they could decide whether the elements were proved beyond a reasonable doubt, but I must say I never thought, and I had discussions in chambers with you and succor [sic] counsel, I never thought that we were talking about two separate transactions. I really can't find fault with [the Assistant United

States Attorney] for not disabusing me because as I said earlier, it wasn't his function.

[DEFENSE COUNSEL]: The overt acts also specified two different occasions, April 5 and April 17.

THE COURT: They talk about a package of money on the 5th, which I excluded from this case because the package was only brown powder, which used to be white, but other overt acts by themselves are meaningless. To me they are typical of overt acts which are alleged in a narcotics conspiracy, and I placed no significance on them during the colloquy I had.

He wanted to plead to the first count. Perhaps in hindsight I should have let him, but I thought I was doing right at the time.

(285-89).

B. The Trial

Angel Rodriguez, a New York City police officer assigned to the New York Joint Task Force, testified that on April 5, 1973, he and an informer went to an apartment located at 1581 Fulton Avenue in the Bronx in order to buy cocaine. Appellant arrived at the apartment and was introduced to Rodriguez by the informer. When asked if he had the cocaine, appellant stated that his "partner," who was waiting outside, had the cocaine (24, 54*). Although Rodriguez attempted to

*Numerals in parentheses, unless otherwise indicated, are to the trial transcript dated March 18 and 19, 1974.

negotiate a lower price for the drug, appellant insisted on $3,000, which had been agreed upon earlier (23-25). Thereafter, appellant left the apartment and returned a few minutes later with a person whom he introduced as "Roy" (25). "Roy" took a plastic bag out of his pocket and handed it to appellant, who handed it to Rodriguez* (25). Appellant refused to accept the money, and Rodriguez handed the $3,000 to "Roy," who counted the money and handed it to appellant before leaving (26, 54). Subsequent analysis showed that the substance in the package was procaine, a non-narcotic drug used as a cocaine dilutant (159, 168).

Knowing that the substance involved in the April 5 transaction was procaine,** Rodriguez attempted, on April 17, to arrange for the purchase of three-eighths of a kilo of cocaine at a price of $9,000 (30). Rodriguez stated that he met with appellant in the afternoon of April 17 at the Mia Casa Social Club in the Bronx (33). Rodriguez and appellant discussed the transaction at the bar in the presence of the co-defendant, Miss Reyes, whom appellant instructed to go to his apartment and bring back the drugs and the cutting

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*Rodriguez stated that although appellant told "Roy" to hand the package to Rodriguez, "Roy" instead handed it to appellant (55).

**Rodriguez stated that although he was fully aware of the procaine in the package on April 5, neither he nor appellant mentioned it during their negotiations on April 17. Rodriguez did complain to appellant, however, that the "cocaine" he purchased on April 5 was "lousy" (32).

material (33-36, 70).*

William Rawald, another New York City police officer assigned to the Joint Task Force, testified to the events surrounding their unsuccessful attempt to arrest appellant and "Roy" in front of the apartment at 1581 Fulton Avenue on the night of April 17. He testified that he and Detective Murphy and another officer followed the truck in which appellant was a passenger** to 1581 Fulton Avenue, where the truck stopped. The police undercover car pulled up a car's length behind the truck and turned on its high beam so that the occupants of the truck could not tell who they were (102-05). He asserted that as appellant got out of the truck the three officers exited from their vehicle with guns drawn and rushed toward appellant in an attempt to place him under arrest (103). Seeing the three men, appellant immediately jumped and the truck started to pull away (103). Rawald testified that he ran up to the side of the truck as it pulled off and shouted, "Stop, Police" (104). Simultaneously, he observed appellant with a gun in his hand pointed in Rawald's direction (104). Rawald testified that

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*Members of the surveillance team testified to observing Miss Reyes leave the club, go to appellant's apartment, and return to the club with a brown paper bag (83-86, 88-92).

**Rodriguez testified that when appellant did not appear at the pre-arranged time on April 17, he called the club and spoke to Miss Reyes, who stated that appellant had left with "Roy" more than an hour previously (37-39).

he fired a shot at appellant, at which time appellant dropped a loaded .45 calibre pistol which was retrieved and offered into evidence (Government Exhibit #2) (104-05). Although the police gave chase in their car, appellant and "Roy" successfully got away (104-05).

Appellant was arrested at his home later that morning. According to his testimony, William Murphy, the undercover police officer who participated in the April 5 transaction, was one of the three officers who participated in the unsuccessful attempt to arrest appellant on April 17. Appellant pointed the gun at Rawald before the latter identified himself as a police officer (128).

In addition, Detective Murphy was present when appellant made a post-arrest statement to Assistant United States Attorney Pyckett immediately prior to arraignment on the within charge. This interrogation was conducted entirely in English. Although Murphy testified that Pyckett administered Miranda warnings prior to the interview, he did not testify at trial to appellant's responses to these rights. (Government Exhibit #4 for identification, annexed as "E" to appellant's separate appendix, is Pyckett's written record of this interview). Pyckett's interview record reflects that when advised of his right to assigned counsel prior to questioning, appellant replied, "I don't have enough money for a lawyer." No lawyer was provided, and the answer was ignored by the Assistant United States Attorney, who then

proceeded to elicit the damaging admissions. According to Murphy, appellant stated he was present at the April 5 sale which involved "cocaine," and not procaine, and stated that he made $100 on that transaction, and further admitted arranging the aborted sale of April 17 and 18 with "his connection." However, Murphy stated that appellant denied being in the truck on the evening when this delivery was to have occurred (131-33).

At the end of the Government's case, counsel for appellant moved to dismiss count one (conspiracy) on the ground that the proof failed to establish beyond a reasonable doubt that appellant had conspired with another to distribute cocaine (171-72). The Court denied this motion** (175-76). Judge Brieant did, however, rule that the only conspiracy evidence related to the April 17 and 18 transaction (174, 188-89), and therefore struck the first overt act alleged in the indictment.**

The defendants rested without calling any witnesses.

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*The Judge considered himself bound by United States v. Bohle, 475 F.2d (2d Cir. 1972), which the Court stated "qualifies the recently adopted Taylor rule in this Circuit by telling us that if inferences are evenly balanced it must go to the jury" (175).

**Overt Act 1 alleges that "on or about the 5th day of April 1973 the defendant and Rafael Navedo delivered a package and accepted money at 1581 Fulton Avenue, Bronx, New York."

C. The Charge

As to the conspiracy charge (count one), the Court instructed the jurors, inter alia, that:

> In order to convict either of these defendants you must find, with respect to Count One, that the particular defendant conspired wither with the other defendant or the person known as Roy. It takes at least two conspirators for there to be a criminal conspiracy. Here these two on trial and Roy are the only persons whom the jury may find to be conspirators. There is no basis to assume the presence or participation of any other or additional person.
>
> (246).

As to the charge of possession of a firearm during the commission of a federal felony (count two), the Court instructed the jury that the federal felony contemplated in count two was the conspiracy alleged in count one, and accordingly the jurors must acquit appellant on count two in the event he was found not guilty on count one (255).

Concerning count three (assault on a federal officer), the Court did not instruct the jury that knowledge of the officer's true identity was an essential element of the crime, nor did defense counsel request such a charge. The Court set fourth the elements of the crime as follows:

> First, that on or about April 18, 1973, Sergeant Rawald ... was a New York police officer assigned

to and working for and under the control of the New York Joint Task Force....

The second element of the crime: That on the same date the defendant forcibly assaulted or resisted or opposed or impeded or intimidated or interfered with ... Rawald.

Third, that the defendant wilfully did the act or acts charged, and, fourth, that at the time Sergeant Rawald was acting in the performance of his official duties.

(256-57).

The Court further instructed the jury, as to count three:

... Pointing a gun at somebody could constitute an assault.

(258).

To prove the offense here charged, the Government is not required to prove that the defendant Navedo knew that ... Rawald was an officer of the Bureau of Narcotics and Dangerous Drugs.

(258-59).

If, after considering all the evidence in accordance with my instructions to you you come to the conclusion that a defendant violated the statute, then in that event the defendant's personal or private reasons for violating the statute are of no consequence so far as his guilt is concerned.

(259-60).

D. The Verdict

The jury convicted appellant on all three counts of the indictment and acquitted the co-defendant, Miss Reyes.

E. The Post-Trial Motion to Dismiss.

Prior to sentence, appellant moved to set aside the jury's verdict on counts one and two and for a directed verdict on these counts, on the ground that the verdict was not supported by substantial evidence. More specifically, defense counsel contended that since the jury had acquitted the co-defendant on the conspiracy charge, the jury must have believed that appellant had conspired with "Roy."

As to "Roy," however, appellant maintained that since the Court had concluded that there was insufficient evidence to show that "Roy" knowingly conspired to deal in cocaine, this evidence was similarly insufficient to support a verdict (Affidavit of Michele Hermann, dated April 12, 1974, in support of the motion to set aside the verdict pursuant to Rule 29 of the Federal Rules of Criminal Procedure).

The motion was denied on the ground that there was "sufficient evidence" to support the verdict (290-91).

F. The Sentence

The Court imposed concurrent sentences of three

years on count one (conspiracy), five years on count two (unlawful possession of a firearm), and four years on count three (assault on a federal officer).

ARGUMENT

Point I

THE DISTRICT COURT'S REJECTION OF APPELLANT'S OFFER TO PLEAD GUILTY TO CONSPIRACY TO SELL COCAINE (COUNT ONE) CONSTITUTED AN ABUSE OF DISCRETION.

The record reflects that the District Court rejected appellant's offer to plead guilty for the following reasons:

(1) That appellant had failed to prove that "Roy," an identified and unindicted co-conspirator, shared the same conspiratorial intent as appellant;

(2) That appellant failed to admit conspiring with the co-defendant, Miss Reyes;

(3) That appellant had failed to make clear that the conspiracy encompassed two sales of cocaine, one on April 5 and the other on April 17.

The District Court's alternative rationales for rejecting the plea reveal a total misunderstanding of the facts in the case and a misapprehension of Rule 11 of the Federal Rules of Criminal Procedure which sets forth the requirements for acceptance of a guilty plea. By virtue of the Court's excessive caution and unreasonable refusal to accept this plea, appellant is now compelled to serve

two additional years in prison based on his conviction on counts two and three.

Under Rule 11* of the Federal Rules of Criminal Procedure, the District Court has discretion to refuse to accept a guilty plea. However, where rejection of the plea is without good cause, the refusal constitutes an abuse of discretion. United States v. Gaskins, 485 F.2d 1046 (D.C. Cir. 1973); Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968); McCoy v. United States, 363 F.2d 306, 307 (D.C. Cir. 1906).

While Rule 11 requires that the court be "satisfied that there is a factual basis for the plea," it was never intended to discourage the acceptance of guilty pleas. As the Supreme Court noted, in Santobello v. New York, 404 U.S. 257, 262 (1971):

> The disposition of criminal charges by agreement between the prosecution and the accused ... is

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*Rule 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty ... the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

an essential component of the administration of justice.

The record here reflects that, after thoroughly discussing the case with his attorney, appellant offered to plead guilty to conspiracy to sell cocaine (count one) in full satisfaction of the three-count indictment. The Government consented to the plea and represented that it was able to prove a prima facie case under count one.* The Assistant United States Attorney noted that the package sold to undercover agents on April 5 turned out to be procaine, a non-narcotic substance; however, the Government maintained that appellant's post-arrest statement referred to the transaction as one involving "cocaine," thereby reflecting appellant's lack of awareness of the true contents of the package. In response to the Court's questioning, appellant admitted that what the Government said was true. He admitted that he assisted "Roy," an unindicted co-conspirator, in delivering what was believed to be cocaine on the evening of April 5. He further acknowledged negotiating with the undercover agents and conspiring with "Roy" on a second sale of cocaine which he and "Roy" admittedly attempted to deliver on the night of April 17. The record reflects that the Court never asked

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*This count alleged a continuing conspiracy to sell cocaine from April 2 to the date of filing the indictment (October 18, 1973) between appellant, the co-defendant, and "others unknown to the Grand Jury." The indictment alleged three overt acts occurring on April 5, 17, and 18, 1973.

appellant to admit conspiring with the co-defendant, Miss Reyes, who was appellant's girl friend. Nor did appellant volunteer any such information, maintaining throughout that he conspired with "Roy." The Court reserved decision and requested a memorandum of law from the Government.

In its memorandum of law in support of acceptance of the plea offer, the Government maintained that since appellant had admitted participating in the conspiracy with "Roy" on April 5, and since appellant admitted he intended to deliver cocaine on that date, this was sufficient basis for accepting the plea and urged the Court not to "speculate as to the state of mind of the other co-conspirators."* Additionally, the Government pointed out that the plans and negotiations relative to the aborted delivery of cocaine on April 17, between appellant and "Roy," which appellant readily admitted, constituted a further factual basis for acceptance of the plea.

On January 25, 1974, the Court rejected the plea offer because appellant's statement in support of the plea failed to establish

> ... at least one co-conspirator who had the specific intent to engage in a conspiracy to deal in narcotic drugs and based on the information he gave me when I examined him that did not exist.
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> January 25, 1974, at 3.

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*Annexed as "D" to appellant's separate appendix.

Since appellant fully admitted conspiring with "Roy" with regard to the April 5 transaction and the April 17 transaction, there was sufficient "factual basis" for acceptance of the plea under Rule 11. The District Court placed an impossible burden on appellant by requiring him to prove the mental intent of the co-conspirator. While this was readily inferrable from the circumstances, especially those relating to the April 17 transaction, it was not susceptible to absolute proof, which the District Court required. More importantly, however, the co-conspirator's intent was not a prerequisite to acceptance of the plea because appellant had fully admitted that he and "Roy" conspired together. United States v. Struther, 458 F.2d 424 (5th Cir. 1972).

In addition, the Court misconstrued the requirements of Rule 11. While the court is obliged to determine "that there is a factual basis for the plea," the Court below improperly limited the source of the "factual basis" to the admissions of appellant at the time of the plea offer. The Advisory Committee and Historical Notes reflect that the "factual basis" for the plea may be satisfied from any number of sources:

> ... inquiry of the defendant or the attorney for the government or by examining the presentence report or otherwise.

Thus, factual basis for the plea could be found in 3500

material, the presentence report, or the Assistant United States Attorney's statement of the evidence against appellant. As the Government and appellant argued, even completely disregarding the April 5 transaction, appellant was involved in still a further attempt to deliver cocaine on April 17, and this alone constitutes sufficient factual basis for acceptance of the plea.

On March 18, immediately prior to commencement of the trial, the Court stated still another reason for refusal of the plea. Judge Brieant stated that appellant did not

> ... concede in any way that [the co-defendant] was involved in any wrongdoing with him and in the absence of an admission on his part to that effect I felt constrained that I could not accept his plea of guilty to the first count because an essential element was lacking.
>
> March 18, 1974, at 9.

The Court's reasoning is indefensible. In light of the fact that the indictment expressly referred to other co-conspirators unknown,* appellant fully admitted the charge alleged in count one when he admitted conspiring with "Roy." Moreover, as the Court acknowledged at the end of the trial, the jury verdict, which acquitted Miss Reyes, the co-defendant, and convicted appellant of conspiracy, fully bore out appel-

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*With regard to the conspiracy count, the Court instructed the jury that the only possible conspirators were appellant, Miss Reyes, and "Roy."

lant's contention in support of the plea, i.e., that he had knowingly conspired with "Roy" and not with the co-defendant.

The refusal to accept the plea because appellant failed to admit conspiring with Miss Reyes constitutes an abuse of discretion. United States v. Gaskins, 485 F.2d 1046, 1048 (D.C. Cir. 1973); see also North Carolina v. Alford, 400 U.S. 25 (1970).

At the end of the trial, in response to defense counsel's motion to set aside the verdict on count one for insufficiency of the evidence, the Court offered still a further explanation for rejecting the plea:

> ... [I]t was never made clear to me in the colloquy we had or in the statement I took when I took the plea, that the powder incident occurred on the 5th of April and that the other activities occurred on the latter date.
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> * * *
>
> ... [I] must say I never thought ... that we were talking about two different transactions.
>
> (285).

As stated earlier, the record reflects that the Assistant United States Attorney's statement, appellant's admissions, the indictment, and appellant's post-arrest statement all refer to two separate transactions, one on April 5 and the other on April 17. The Court's remarks reflect the total misapprension under which he was laboring

at the time the plea was rejected.

At the end of the trial, the Court candidly acknowledged:

> ... Perhaps on hindsight I should have let him [plead guilty to count one], but I thought I was doing the right thing at the time.

Appellant will be compelled to serve two additional years in prison for his conviction on counts two and three solely because of this error.

For the foregoing reasons, this Court should vacate the sentence on all counts and remand for re-sentence to the District Court with instructions to set aside the jury verdict and impose sentence upon an adjudication of guilt based on acceptance of appellant's plea of guilty to count one.

Alternatively, should the Court find insufficient factual basis for acceptance of the plea, this Court should set aside the verdict as to count one based on insufficiency of the evidence, inasmuch as the proof of "Roy's" state of mind as a co-conspirator was identical to the proof offered by appellant and the Assistant United States Attorney in support of acceptance of the plea of guilty.

Point II

THE EVIDENCE IN SUPPORT OF COUNT THREE IS INSUFFICIENT TO SUPPORT THE VERDICT. ALTERNATIVELY, THE DISTRICT COURT'S FAILURE TO CHARGE KNOWLEDGE OF THE IDENTITY OF THE FEDERAL OFFICER AS AN ESSENTIAL ELEMENT OF 18 U.S.C. §111 CONSTITUTES PLAIN ERROR.

On the night of April 17, two undercover surveillance officers and an undercover police officer posing as a drug dealer followed the truck in which appellant was a passenger from the Mia Casa Club to the address at 1581 Fulton Avenue in the Bronx where an alleged sale of cocaine was to take place. The officers stopped their vehicle a carlength behind the truck when it stopped at 1581 Fulton Avenue and focused their high beams on the truck so as to obstruct appellant's vision. As appellant got out of the truck and walked toward its rear, the three officers got out to place appellant under arrest. With guns drawn, but without identifying themselves, they ran in appellant's direction. Startled by this armed attack, and unaware who these men were, appellant scrambled back into the truck which began to pull away. As the truck accelerated Sergeant Rawald, one of the police officers, ran up to the side of the truck, at which time, he testified, appellant pointed a gun in his direction. At that point Rawald shouted, "Stop, Police."

Detective Murphy's testimony indicated that appel-

lant was pointing the gun in Rawald's direction prior to the time that Rawald identified himself as a police officer. It is clear that appellant did not assault Rawald after he had identified himself as a policeman. Appellant made no attempt to fire the pistol, and immediately dropped it to the ground when Rawald fired at him.

The evidence is insufficient to support the jury verdict as to count three (18 U.S.C. §111). Under these circumstances, appellant was entitled to use reasonable force to protect his property and his person. Since his "assailants" were armed with drawn guns, appellant's use of the pistol to threaten Rawald cannot be considered unreasonable force, and was therefore justified.*

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*New York Penal Law §35.15. Justification; Use of Physical Force in Defense of a Person.

> 2. A person may not use deadly physical force upon another person ... unless:
>
> (a) He reasonably believes that such other person is using or about to use deadly physical force ... [and he cannot retreat with complete safety to himself].
>
> (b) He reasonably believes that such other person is committing or attempting to commit a ... robbery ....

> ... [O]ne who has no actual knowledge that he is being arrested and the circumstances are such as to afford him no reasonable ground to suppose that he is being arrested and he has no fair opportunity to inquire or otherwise ascertain why another is taking, or attempting to take him into custody and the situation in which he finds himself is such as to cause him reasonably to believe that he is being subject to a hostile attack against his person, has a right to use reasonable force to defend himself.
>
> United States v. Heliczer, 373 F.2d 241, 248 (2d Cir. 1967).

Moreover, in the event that the high beam lights did not accomplish their intended effect and preclude recognition, appellant undoubtedly recognized Murphy as one of the drug dealers to whom he and "Roy" had sold a quantity of cocaine for the sum of $1,300 on April 5. Under these circumstances appellant must have been in fear of physical reprisals to his person and property since Rodriguez, Murphy's undercover partner, had earlier complained to appellant about the "lousy stuff" provided in the April 5 transaction. Similarly, the jury could reasonably have concluded that appellant knew that the "stuff" in the April 5 transaction was procaine, rather than cocaine, and was afraid that Murphy and his drug dealer friends were going to retaliate for defrauding them. Under either interpretation, however, the jury could conclude

only that, faced with what appellant considered to be a felonious assault with a deadly weapon, he acted reasonably in defense of his person when he pointed his gun at one of the supposed assailants.

The standard of review in considering a claim of insufficiency of evidence "is no longer the rather low one of United States v. Tutino," but rather "the test ... is whether upon the evidence, giving full play to the right of the [trier of facts] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude a reasonable doubt.'" United States v. Freeman, Docket No. 74-1238, slip opinion at 4013 (2d Cir., June 7, 1974), quoting from Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947). The Government's proof here falls far short of that standard.

Alternatively, the Court committed plain error by failing to charge the jury that knowledge of the identity of the officers as law enforcement officials was an essential element of the crime under 18 U.S.C. §111. United States v. McKenzie, 403 F.2d 983 (2d Cir. 1969) (Kaufman, J.)

In McKenzie, supra, this Court expressly adopted the decision of the Sixth Circuit in United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968). There, Internal Revenue Service agents went to the defendant's home to collect a $128 tax debt and, failing that, to seize the defendant's vehicle to

satisfy the tax claim. According the agents' version of the facts, the defendant did not answer the door when they knocked and they therefore proceeded to seize the defendant's truck. At this point, the defendant appeared at the front door with a shotgun in his hand and directed the officers to leave his property.

In reversing, the Sixth Circuit held that the District Court's failure to instruct the jury that the defendant must have knowledge that the men against whom the assault was directed were federal law enforcement officers acting in the performance of their duties constituted plain error. The Court reasoned that:

> ... [I]f the car "thief" had not been an officer acting in an official capacity, Rybicki would have had the right to threaten and use reasonable force to prevent the theft of his property.
>
> Id., at 602.

The present case is much stronger than Rybicki, since appellant here, confronted with what he reasonably believed was a felonious attack or an attempted robbery, acted in self-defense of his person and property. Because the officers did not identify themselves to appellant and, in fact, acted so as to obscure their identity from him, and because, in these circumstances, it was reasonable for appellant to believe he was being assaulted, the Court's failure to instruct that knowledge that the officers were law enforcement officials

was required in order to convict is plain error.*

Those cases holding that knowledge of the persons acted against is not an element of the crime under 18 U.S.C. §111, e.g., United States v. Montanaro, 362 F.2d 527 (2d Cir. 1966); United States v. Lombardozzi, 335 F.2d 414 (2d Cir. 1964), are inapposite here because they involve unprovoked assaults, and thus the right to defend one's person and property from physical attack and theft does not apply. To the contrary, the assaults in those cases would have constituted an offense "regardless of the person against whom they were committed." United States v. Rybicki, supra, 403 F.2d at 602. See also United States v. Martinez, 465 F.2d 79, 82 n.* (2d Cir. 1972); United States v. Ulan, 421 F.2d 787, 790 (2d Cir. 1970).

Since the District Court's failure to charge relates to an essential element of the crime, this Court should reverse, United States v. Screws, 325 U.S. 91 (1945); United States v.

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*In McKenzie, supra, the Court failed to find plain error only because the assault occurred after the officers identified themselves to the defendant, and the defense conceded this at trial. Here, however, there was no such concession, and the undisputed facts of the Government's case refute such an interpretation. Accordingly, Rule 52(b) of the Federal Rules of Criminal Procedure should apply. United States v. Young, 464 F.2d 160 (5th Cir. 1972).

Fields, 446 F.2d 119 (2d Cir. 1972), despite defense counsel's failure to object below.*

*Alternatively, this Court should remand to the District Court for a hearing concerning trial counsel's competency in failing to object or assert all available defenses at trial. United States v. Bennett, 409 F.2d 888, 899 (2d Cir. 1969); see also United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973).

Point III

THE INTRODUCTION OF APPELLANT'S POST-ARREST INCULPATORY STATEMENT OBTAINED IN VIOLATION OF MIRANDA v. ARIZONA CONSTITUTES PLAIN ERROR.

Prior to arraignment appellant, a forty-year-old Spanish-speaking person, was interviewed in English in the office of the United States Attorney. Despite appellant's assertion of indigency in reply to advice of his right to a lawyer free of charge prior to questioning, the interview was conducted without the services of appointed counsel. In total disregard of appellant's Fifth and Sixth Amendment rights made explicit in Miranda v. Arizona, 384 U.S. 436 (1966), the Government obtained critical admissions of appellant's participation in a conspiracy to sell cocaine. This statement was essential to the Government's case.

Following his arrest on April 18, but prior to his arraignment before the magistrate, appellant was taken to the offices of the United States Attorney for the Southern District of New York for the purpose of interrogation. Appellant was interviewed there by Assistant United States Attorney Pyckett in the presence of the arresting officer, Detective Murphy. Despite appellant's Spanish background* and his in-

*The services of a Spanish interpreter were required at every stage of the court proceedings. In addition, Judge Brieant expressly noted appellant's "language problem" at the end of the trial (285).

ability to communicate fluently in English, the Government supplied no interpreter and conducted the entire interview in English. Government Exhibit #4 for identification* is the contemporaneous record of this interview made by Assistant United States Attorney Pyckett and witnessed by Detective Murphy. Page one of the interview sheet reflects the following advice and response concerning appellant's right to counsel in the event he could not afford a lawyer:

> Q. If you do not have funds to retain an attorney, an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?
>
> A. I don't have enough money for a lawyer.

Appellant's assertion of indigency in response to this advice constituted an implicit request for counsel, and therefore all questioning should have ceased until appellant had been afforded an opportunity to consult with counsel.

> ... If [the accused] indicates in any manner ... that he wishes to consult with an attorney before speaking there can be no questioning.
>
> Miranda v. Arizona, supra, 384 U.S. at 444.

See also Frazier v. Cupp, 394 U.S. 731, 738 (1969); United States v. Priest, 409 F.2d 49 (5th Cir. 1969); United States v. Nielson, 392 F.2d 849 (7th Cir. 1968).

Appellant's assertion of his financial inability to retain private counsel was sufficient to put the Assistant United States Attorney on notice of his desire for appointed counsel. Instead of ceasing the interview, or at the very least clarifying appellant's response, the Assistant United States Attorney chose simply to ignore appellant's assertion and mechanically continued to the next question on the form, either oblivious to or in total disregard of the accused's Fifth and Sixth Amendment rights. Moreover, the question and response immediately following do not reflect a knowing and intelligent waiver of the Fifth Amendment privilege:

> Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?
>
> A. Nods.

Positing this question in its conjunctive form, i.e., "information ... about your background and your version of the facts," was obviously designed to induce an affirmative reply, because background information, for all practical purposes, is a pre-requisite for setting bail. Thus, any accused wishing to be released on bail while awaiting trial would obviously find it in his best interest to provide this "background" information. Therefore, appellant's equivocal "nod" should not be interpreted as a knowing and intelligent waiver of his right to counsel and/or his privilege against self-incrimination with regard to appellant's "version of the facts," es-

pecially here where appellant had asserted his indigency in reply to the previous question concerning his right to the presence of appointed counsel if he could not afford a lawyer. The ambiguous and uncertain "nod" should have put the interrogating Assistant United States Attorney on further notice not to proceed with further questioning until a lawyer was provided.

This proof falls far short of the "heavy burden [which] rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to ... appointed counsel." Miranda v. Arizona, supra, 384 U.S. at 475.

> ... "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> Ibid., quoting from Carnley v. Cochran, 369 U.S. 506, 516 (1962).

The government attorney's insensitive handling of the interview constituted an exploitation of appellant's Fifth Amendment rights:

> ... While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.
>
> Id., at 472.

Moreover, the Assistant United States Attorney's conduct also constitutes a violation of the Canons of Professional Ethics, Canon 9,* which, inter alia, states:

> ... It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel ....
>
> American Bar Association, Opinions of the Committee on Professional Ethics, Canon 9, at 43 (1967 ed.)

Additionally, under Canon 2** of the American Bar Association Code of Professional Responsibility, an Assistant United States Attorney, as any other member of the Bar, is under a continuing responsibility to make legal counsel available to those in need, especially in cases like this one where the party is unable to retain private counsel.

Although there was no objection below, it is clear from the record that this was because of counsel's unaware-

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*While this Canon is usually applied in a civil context, it has "even greater force" with reference to a pre-arraignment interview of a defendant at the hands of an experienced prosecutor. United States ex rel. Vanderhorst v. LaVallee, 285 F.Supp. 233, 241 (S.D.N.Y.), affirmed, 417 F.2d 411 (2d Cir. en banc 1968).

**While Canon 2 is generally applied to attorneys collectively (see A.B.A. opinion 320), it should have no lesser application on an individual basis. Moreover, although not directed specifically at government prosecutors, the latters' obligation in this area, by virtue of their special office, would be even greater.

ness and oversight,* and not to any deliberate trial tactic. Accordingly, appellant should not be said to have knowingly waived his right to raise the issue on appeal. Johnson v. United States, 318 U.S. 189, 200 (1943). The damaging admissions were critical to the Government's case and doubtless weighed heavily in the jury's considerations. The admission of these statements, being an error of constitutional dimension, should be noted as plain error. United States v. Atkinson, 297 U.S. 157 (1936).

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*Alternatively, this Court should remand for a hearing on the issue of the adequacy of counsel's representation in light of the failure to move to suppress this statement. United States ex rel. Saltys v. Adams, 465 F.2d 1028 (2d Cir. 1972).

CONCLUSION

For the foregoing reasons, the case should be reversed and remanded to the District Court for a new trial, or alternatively, remanded to the District Court for re-sentence with instructions to set aside the jury verdict of guilty and to impose sentence upon an adjudication of guilt based on acceptance of appellant's plea of guilty to count one.

Respectfully submitted,

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Certificate of Service

7/3/74, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Thomas Boyle Jr